IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1063

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; ILLINOIS BELL TELEPHONE COMPANY; AND SOUTHWESTERN BELL TELEPHONE COMPANY, *Petitioners*,

v.

MCI COMMUNICATIONS CORPORATION; MCI-NEW YORK WEST, INC.; INTERDATA COMMUNICATIONS, INC.; AND MICROWAVE COMMUNICATIONS, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 3, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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No.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; ILLINOIS BELL TELEPHONE COMPANY; AND SOUTHWESTERN BELL TELEPHONE COMPANY, *Petitioners*,

v.

MCI COMMUNICATIONS CORPORATION; MCI-NEW YORK WEST, INC.; INTERDATA COMMUNICATIONS, INC.; AND MICROWAVE COMMUNICATIONS, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari be issued under 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on December 14, 1978.

OPINION BELOW

The memorandum opinion of the court of appeals which accompanied its order is unpublished. That opinion is annexed hereto as Appendix A. For the

convenience of the Court, the protective order of the district court referred to by the court of appeals in its memorandum opinion is annexed hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Seventh Circuit asserted appellate jurisdiction over the decision of the district court under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The jurisdiction of this Court to issue a writ of certiorari under 28 U.S.C. § 1254(1) to review the order of the court of appeals is established by the following decisions of this Court:

> *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); and
>
> *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684 (1950).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding the modification of a protective order in order to afford the Government access to materials and information made available by petitioners under that protective order solely for the use of the plaintiffs and solely for the purposes of this case, where the protective order was entered by stipulation of the parties in this case, where Government counsel expressly represented to petitioners that it had no intention of seeking access to the discovery in this or any other private case against them, and where petitioners relied upon both the protective order and the Government's representation and have been seriously prejudiced thereby?

2. Whether a private party can properly be permitted to assist the Government in an antitrust case against a common defendant by turning over to the Government analyses of discovery materials obtained under an agreed protective order in which that party expressly undertook that it would not disclose such analyses to anyone except for the purposes of the case in which that party was involved?

STATUTORY PROVISION INVOLVED

The pertinent provision of the Federal Rules of Civil Procedure—Rule 26—is set forth in Appendix C to this petition.

STATEMENT OF FACTS

The order to which this petition is directed arises from the effort by the United States, a non-party to this action, to obviate a protective order entered by the United States District Court for the Northern District of Illinois on August 6, 1974, in order to gain access to documents, deposition transcripts and the analyses of plaintiffs' counsel made therefrom for use in its own pending antitrust case against the Bell System—that is, *United States* v. *American Tel. & Tel. Co.*, Civil Action No. 74-1698 (D.D.C.). The background of this protective order and the Government's efforts to modify it are set out in the petition for certiorari now pending before this Court in *American Tel. & Tel. Co.* v. *United States*, No. 78-761 (see pp. 7-9).

The petition in *American Tel. & Tel. Co.* v. *United States* involves a request for review of a judgment of the United States Court of Appeals for the District of Columbia Circuit denying a petition for a writ of

mandamus to set aside an order of the district court in *United States* v. *American Tel. & Tel. Co.* compelling the petitioners to produce to the Government microfilm copies of all documents produced to and selected by MCI in this case and by another plaintiff in another private antitrust case pending against the Bell System in the Southern District of New York (*Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, No. 76 Civ. 2512).

Shortly after the issuance of the district court's order in *United States* v. *American Tel. & Tel. Co.*, the district court in this case issued an order modifying its protective order so as to permit the Government access, not only to the documents generated in the discovery here, but also to deposition transcripts and the analyses of such materials by MCI's counsel. On appeal, that order was affirmed by the Court of Appeals for the Seventh Circuit in an unpublished order under that Court's Rule 35, which prohibits its citation or use "as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose."

The decision of the court of appeals was based solely upon what it regarded as controlling exigencies of this situation. The court rejected the contention advanced by the Government that the order it sought was consistent with the terms of the protective order itself (App. A, pp. 2a-3a, 7a); it recognized that there is a substantial line of decisions—including every decision on the issue involving efforts by the Government to obtain access to discovery in private antitrust cases—declining to modify protective orders of the kind involved here at the instance of strangers seeking access to discovery made under such orders (*id.* at 6a-7a); and it held that since the protective order here was agreed to by the parties, "there is a higher burden on the movant to justify the modification of the order" (*id.* at 7a). It nonetheless permitted modification of the protective order because of the "wastefulness of requiring government counsel to duplicate the analyses and discovery already made" (*id.* at 8a).

REASONS FOR GRANTING THE WRIT

1. The writ should be granted in this case in order that this Court can resolve an important question of federal law which has not been, but should be, resolved by this Court. The court of appeals itself referred to the question involved in its order as one of "appellate first impression" (App. A, p. 6a). Moreover, it recognized that the weight of authority among the district courts was contrary to its ruling (*id.* at 6a-7a).

In fact, prior to the decision of the district court in this case and that of the District Court for the District of Columbia in *United States* v. *American Tel. & Tel. Co.*, there was an unbroken line of twelve different decisions rejecting efforts by governmental agencies to gain access to discovery in private antitrust suits. *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D.N.Y. 1972); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 Fed. R. Serv. 2d 1251 (N.D. Cal. 1974); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, No. C-71-1906-SW (N.D. Cal.) (Transcript, September 30, 1974); *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. ¶ 61,961 (E.D. Pa. 1976); *Wyly Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-1544 (D.D.C.) (Order

of July 20, 1978); *Alcoa* v. *United States Department of Justice*, 1978-1 Trade Cas. ¶ 61,824 (D.D.C. 1978); *Martindell* v. *International Tel. & Tel. Corp.*, 25 Fed. R. Serv. 2d 1283 (S.D.N.Y. 1978); *United States* v. *GAF Corp.*, 449 F. Supp. 351 (S.D.N.Y. 1978); *United States* v. *ARA Services, Inc.*, 1978-2 Trade Cas. ¶ 62,250 (E.D. Mo. 1978); *TV Signal Co. of Aberdeen* v. *American Tel. & Tel. Co.*, Civil Action No. 70-6N (D.S.D.) (Order of July 14, 1978); *In re Cement and Concrete Antitrust Litigation*, MDL Dkt. No. 296, Civ. 76-788A PHX CAM (D. Ariz.) (Order, June 1978).

The views of the courts with respect to the unlawfulness of this strategy were unequivocal. In one frequently cited case, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. ¶ 61,961 (E.D. Pa. 1976), for example, Judge Higginbotham branded the Government's strategy as a distortion of the compulsory processes of the courts (*id.* at 74,069):

> "Here, the USITC seeks wholesale access to the fruits of plaintiffs' discovery. Clearly, if the instant actions had not been filed, plaintiffs Zenith and NUE, against whom the USITC is now proceeding, would never have acquired the documents the USITC is seeking. Just as clearly, *the proper discovery route for the USITC is to proceed directly against defendants, as if the instant action had never been filed. This Court will not be a party to a distortion of the purposes of its compulsory process.*" (Emphasis supplied.)[1]

In yet another case, *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), which is perhaps

[1] Similarly, in a later phase of the same proceeding, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-2 Trade Cas. ¶ 62,109 (E.D. Pa. 1978), the court reached the same result when a private party sought to obtain discovery under the same circumstances, emphasizing that to allow a wholesale appropriation of the fruits of discovery from another proceeding would be nothing less than "an abuse of the discovery process" (*id.* at 74,367-68):

> "It is an abuse of the discovery process to order a defendant in the instant litigation to produce all documents which he had submitted in another case under the judicial imprimatur that those documents when submitted, were judicially protected as confidential."

the leading case on the subject, Judge Frankel condemned the Government's new strategy as fraught with the "potential for oppression" (*id.* at 132):

> "Volunteered resources employed at large private expense are added to the authorized Government energies available against Kodak. That this particular defendant is a corporate giant (assailed by a plaintiff who is no pigmy) cannot obviate *the unease engendered by the alliance.* Congress, deciding authoritatively for all of us, has allocated resources to law enforcement, both civil and criminal. Sometimes it has given express encouragement to informants and other adjuncts . . . . It is quite another thing for a court to sanction, and thus to encourage, the use of private litigants' devices as reinforcements for federal prosecutors, whether civil or criminal. *The potential for oppression against enterprises large and small, or against individuals, is not rendered imaginary by our inability to forecast it with clarity.*" (Emphasis supplied.)

The court of appeals' order does not remotely justify its refusal to adopt the principles announced and applied in these decisions. The stated ground of that order—that to compel the Government to conduct its own discovery would be wasteful—would, if taken literally, justify the modification of any protective order, since it is always theoretically wasteful to duplicate discovery. Moreover, the circumstances in this case are

so extreme that modification of the protective order here would make virtually any other case an *a fortiori* instance for the same result.[2]

The protective order in issue is the product of an express agreement between the parties (App. A, p. 7a). It was relied upon in the discovery process in the *MCI* case itself (*id.* at 2a-3a) and, although the Court of Appeals failed to acknowledge the fact, in the discovery process in *United States* v. *American Tel. & Tel. Co.* Moreover, in the latter discovery, defendants' counsel also relied upon a representation made by Government counsel that it had no intention of ever seeking to modify the *MCI* protective order or any other protective order entered in a private antitrust suit against the Bell System (see Petition in No. 78-761, pp. 4-5). In reliance upon the protective order and the Government's representation, defendants accepted stays of discovery entered *sua sponte* by the district court, and the Court of Appeals in *United States* v. *American Tel. & Tel. Co.*, which prevented them from engaging in discovery for nearly three years while the discovery in this case and other private cases was proceeding (*id.* at 6-7). In these circumstances, petitioners submit that the court of appeals' order stands unjustified for the simple reason that it is unjustifiable.[3]

[2] Indeed, the court of appeals apparently reflected its own awareness of this fact, as well as the absence of any solid basis for limiting its decision, when it ordered that its decision not be published or relied upon within the Seventh Circuit. This action simply emphasizes the absence of any reasoned basis for the court's order and lays bare the extreme character of the order here. One can hardly escape the impression that the court concluded that because of the magnitude of *United States* v. *American Tel. & Tel. Co.*, established principles of law are apparently to be ignored in favor of *ad hoc* expediencies which are so dangerous that their application to that case is not to be regarded as precedent in any other case.

2. The writ should also be granted to prevent a severe disruption in the administration of justice in the federal courts. A threat of such disruption arises first from the fact that the court of appeals' decision will inevitably undermine the confidence that litigants place in protective orders, stipulations and representations of opposing counsel—confidence that is absolutely necessary to the orderly conduct of discovery in complex litigation of this kind.

The protective order in this case was intended to provide a fair and equitable mechanism to speed the production of documents and the progress of depositions during pretrial discovery and was accepted and relied upon by petitioners for that purpose.[4] As a

[3] This conclusion is reinforced by the opposition to certiorari filed by the Government in No. 78-761. In that filing (p. 3), the Government opposed certiorari on the theory that the protective order in this case contemplated the order obtained by the Government—a construction of the protective order directly repudiated by the court of appeals (App. A, pp. 2a-3a, 7a)—and on the theory that none of the district court decisions relied upon by petitioners is applicable to the situation here (U.S. Opposition at 9-10)—a position that was also rejected. Indeed, the Court of Appeals' decision, as plainly wrong as it is, discredits the Government's entire opposition in No. 78-761, except to the extent that the Government relies upon the notion that the district courts have unbounded discretion in discovery matters. Although the Court of Appeals appeared to accept that notion, it is not, and never has been, the law.

[4] The protective order expressly stated that "the public interest in the prompt and orderly administration of justice requires that production of the voluminous documents and other discovery materials involved in this case proceed as expeditiously as pos-

result, discovery in the *MCI* case proceeded expeditiously, and very few disputes about discovery required the attention of the district court.

If the court of appeals' decision is allowed to stand, protective orders and stipulations as tools to conserve judicial resources and expedite pretrial proceedings will be rendered ineffective. Regardless of the provisions of a protective order issued over the signature of a United States District Judge, and regardless of representations and agreements made by opposing counsel, a party facing massive discovery in an antitrust or other complex case will know that its documents and the transcripts of any depositions taken of its officers or employees, as well as the work product of opposing counsel, may find its way into the hands of anyone who seeks to litigate any related issue against it. Consequently, the pace of discovery in all such cases will be drastically slowed, and the number of disputes over the permissible scope of discovery to

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sible" and established "procedures . . . which will expedite the discovery process" (App. B, p. 10a). In this respect, the protective order is similar to other such orders which have been increasingly employed in massive antitrust litigation to promote the fundamental purpose of the Federal Rules of Civil Procedure—"to secure the just, speedy, and inexpensive determination of every action" (Federal Rule of Civil Procedure 1). As expressed by one district judge (*In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 Fed. R. Serv. 2d 1251, 1252 (N.D. Cal. 1974):

> "The purpose of this litigation is to determine whether the defendants are liable to the plaintiffs under the antitrust laws and, if so, in what amounts. That in itself is difficult enough. The protective order was issued so that I would be spared the duty of deciding applications for protective orders during the course of discovery. Massive quantities of documents have been furnished by defendants under the umbrella of the protective order and I have been spared such problems."

be resolved by the district courts will be significantly increased.[5]

Beyond this inevitable slowing down of the discovery process, the court of appeals' order invites abuse of that process. The purpose of discovery under the Federal Rules is to permit the parties to a case to prepare for trial in their case, not to obtain documents and collect facts for some other purpose. See, *e.g.*, *Milsen* v. *Southland Corp.*, 1972 Trade Cas. ¶ 73,865 (N.D. Ill. 1972). Yet there is no practical way to prevent just such an abuse of the discovery process if protective orders can be broken at will. Parties can and will avail themselves of the broad discovery rights available under the Federal Rules of Civil Procedure to obtain information of little or no value whatever in their own litigation if they know that they can use the leverage created by their possession of such information—and their right to transfer it to others—to some advantage.[6]

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[5] *Cf. Chamber of Commerce* v. *Legal Aid Society*, 423 U.S. 1309, 1312 (1975) (Opinion in chambers), in which Mr. Justice Douglas relied on a protective order as a factor eliminating the possibility of irreparable injury from compliance with a discovery order which might otherwise violate an arguable congressional intention that the materials to be discovered be treated as confidential. Had the protective order not been available in that case, it would have been necessary to resolve the issue of confidentiality prior to securing compliance with the discovery request.

[6] The court of appeals simply brushed this whole problem aside on the ground that "there is no showing that the government seeks to exploit *MCI* v. *ATT* solely to obtain assistance in the litigation of *USA* v. *ATT*" (App. A, p. 7a). Whatever that is supposed to mean, it surely misses the point here. The point is that MCI may well have engaged in discovery wholly unrelated to any claim it may genuinely be asserting for the sole purpose of creating leverage against petitioners through its efforts to turn over such dis-

Finally, the court of appeals' decision reintroduces the inevitability of the same kind of unfairness that plagued the discovery process prior to the 1970 amendments to the Federal Rules of Civil Procedure. Prior to those amendments, discovery was frequently permitted to proceed on a one-sided basis, with one party being permitted to complete, or substantially to complete, its discovery before discovery by the other party was permitted to commence. The elimination of tactical advantage by gaining priority in the conduct and completion of discovery was an important result of the 1970 amendments.[7] Under the court of appeals'

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covery to others. There is substantial basis in the record indicating that this is precisely what happened, but of course, by its very nature, the matter is not free from doubt. That, of course, is the problem. Such matters are rarely free from doubt and therefore cannot effectively be prevented under the court of appeals' approach.

[7] In formulating the 1970 amendments, the Advisory Committee found the priority practice to be "unsatisfactory and unfair in its operation" and stated that the better practice was the one in effect in some jurisdictions where arrangements were typically made for alternation in the taking of depositions. Proposed Amendments to the Federal Rules of Civil Procedure, 48 F.R.D. 487, 507 (1970). As an example of the practice of which it approved, the Committee cited *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 11 F.R.D. 156, 158 (S.D.N.Y. 1951), a case in which the court rejected the priority rule:

> "*This Court does not believe that any of the litigants should be rendered sterile with the necessary preparation of its case while the other party is conducting its examination,* simply because one got the jump on the other in serving notice, *especially so, where the other* under the Rules *was in no position to make a similar move.* The Court is of the opinion that the interests of justice will be served in the present situation if the examinations proceed apace under the following provision for alternate examination periods." (Emphasis supplied.)

Similarly, the Manual for Complex Litigation provides that all parties should "proceed simultaneously with discovery" (§ 0.50)

decision, however, a litigant in one case may gain precisely the tactical advantage condemned by the 1970 amendments by availing itself of the fruits of discovery in some other case involving a common adversary.

Precisely such a tactical advantage has been gained by the Government in *United States* v. *American Tel. & Tel. Co.* as a result of the court of appeals' decision. The effect of the decision of the court of appeals is to void solely for the Government the stays entered in that case by the district court and the Court of Appeals for the District of Columbia Circuit. Consequently, in that case, the Government has obtained a tactical advantage of four years of discovery not reciprocally enjoyed by the Bell System.[8]

Indeed, the court of appeals' decision creates a situation which is the same as if the District Court for the District of Columbia had entered an order staying all discovery by petitioners for four years but permitting the Government untrammelled discovery during that time. Such retroactive interference with the processes of another court is in no way justified by the fact that the District of Columbia Court has endorsed that procedure as to the documents discovered by MCI,

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since "any other course . . . may prejudice the party first to make discovery or the party whose discovery is deferred" (*id.*). These precepts have been widely followed by the courts in large antitrust cases. See, *e.g.*, *Control Data Corp.* v. *International Business Machines Corp.*, 306 F.Supp. 839, 849 (D. Minn. 1969).

[8] The fact that petitioners have been able to conduct discovery of MCI in this case in the four-year period does not obviate the advantage gained by the Government. Discovery by petitioners in *MCI* focused almost exclusively upon the business of MCI and the cause of its alleged damages—matters which have little relevance to the issues in the Government case.

for the basic conflict is not with the views of that court but with the integrity of its past discovery stay orders which cannot retroactively be made fair to petitioners by either district court once the Government is permitted to appropriate the discovery and analyses undertaken by MCI.[9]

3. In addition, this Court should grant the writ to consider the question raised by that aspect of the court of appeals' order that allows "MCI counsel to make . . . their analyses of data [obtained from petitioners] available to government counsel" (App. A, p. 8a). As noted by the court of appeals, petitioners have already given the Government microfilm copies of the documents it seeks in compliance with the order of Judge Greene. Moreover, the Government's request for access to deposition transcripts from this case is separable from its effort to gain access to the analyses and work product of MCI's counsel. Thus, the Government's interest in avoiding duplicative discovery, even if valid, can be accommodated without modifying the protective order to allow MCI to turn over its analyses of confidential information to the Government.

[9] The court of appeals' decision also endorses a direct circumvention of the process of the *United States* v. *American Tel. & Tel. Co.* court with respect to the production to the Government of the transcripts of depositions taken in the *MCI* case. Although the modification of the *MCI* protective order approved by the Court of Appeals permits MCI to deliver to the Government transcripts of the depositions of petitioners' officers and employees taken in *MCI*, Judge Greene has to date specifically declined to rule that the Government may secure those transcripts directly from the defendants in that case pursuant to a Rule 34 request because "considerations other than those which pertain to the documents may well be present yet the government has made no effort to provide the Court with either a legal or a factual basis on which to order their production" (Opinion of September 11, 1978, in *United States* v. *American Tel. & Tel. Co.*). Judge Greene has under consideration the Government's renewed motion for such access and has scheduled a hearing on the matter for January 11, 1978.

In its decision, the court of appeals found that the protective order involved here is an agreed order which was entered by the district court "at the request and signed consent of the parties" (App. A, p. 2a). As noted by the court of appeals, discovery in the case has been conducted in reliance on the order and others like it, which expressly restrict the use of discovered material and information to the preparation or trial of the case. In such circumstances, the courts have consistently held that it is improper to allow a party who has agreed to such an order or understanding and induced such reliance to vitiate the terms thereof and make discovered materials and information available to strangers to the litigation. Thus, in *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), Judge Frankel held (415 F. Supp. at 131-32):

> "A considerable volume of papers has been given on consent. Sometimes there has been resistance, requiring recourse to the court. Some of the issues raised in motion papers have been resolved by compromise, with or without the court's assistance. *All the positions taken over the years have had presumably in view the understanding that discovery was for the party receiving it, not for strangers to the case, public or private.* There is no need to conjecture whether either side construed or considered this understanding with particular reference to the Government as a prospective recipient of discovery papers . . . . It is also unnecessary, and much too late, to wonder what different views the parties might have taken of discovery questions along the way had they contemplated delivery of their papers to public officials . . . *The supervening idea of disclosure to*

> *the Government must be judged (and burdened) by the understanding that this was never a proposed or expressly anticipated step when the papers were turned over to GAF in the first place."* (Emphasis added.)

Other courts have similarly rejected efforts to modify protective orders retroactively to permit the use of discovery materials for purposes other than the case in which they were obtained. See, *e.g., Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D. N.Y. 1972); *United States* v. *ARA Services, Inc.*, 1978-2 Trade Cas. ¶ 62,250 (E.D. Mo. 1978); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. ¶ 61,691 (E.D. Pa. 1976); 1978-2 Trade Cas. ¶ 62,019 (E.D. Pa. 1978); and *Martindell* v. *International Tel. & Tel. Corp.*, 25 Fed.R. Serv. 2d 1283 (S.D.N.Y. 1978).

The court of appeals recognized the validity of the concern underlying these decisions and held that one who seeks to modify an agreed protective order must satisfy a "higher burden" of demonstrating "exceptional considerations" in order to justify such a modification (App. A, p. 7a). However, when it turned to apply its own standard to this case, the standard simply evaporated, for it found the requirement of "exceptional considerations" to be met on a record in which there is not a scintilla of support for a finding of "exceptional considerations."

MCI has never even asserted that any "exceptional considerations" exist which justify its attempt to repudiate its original agreement to the protective order and the limitations therein on the use of information obtained from petitioners. Quite the contrary, as the record in the district court makes clear, the sole purpose

of MCI in proposing to furnish to the Government its indices and analyses of the discovery obtained from petitioners is to pressure petitioners to accede to some unjustified settlement of its claim. Indeed, MCI can have no other purpose for its willingness to make available to the Government the work product, expertise, and strategy of its counsel—matters which the Government could not possibly obtain from MCI by subpoena or any other existing compulsory process.

Nor has the Government offered any "exceptional considerations" to justify permitting MCI to pursue such an improper strategy. Indeed, the Government's whole approach throughout this controversy has been that it is entitled to anything MCI might be willing to give it as a matter of course.

Whatever savings in time and expense may accrue to the Government by allowing MCI to renege on its agreement to treat information obtained from petitioners as confidential cannot create "exceptional considerations" sufficient to warrant the tactic of MCI. Neither the Government nor this Court should condone the repudiation of an order of a district court, entered on the express agreement of a litigant to abide by its terms, for the purpose of advancing the selfish interests of an antitrust plaintiff. Indeed, to do so is to invite the transformation of litigation into a pressure tactic rather than a means of resolving legitimate grievances in accordance with the law. Clearly, the writ sought by petitioners should issue to correct the sanction afforded such a tactic by the order of the court of appeals.

CONCLUSION

The issue presented by the instant petition is an important one, involving as it does both a dramatic departure from accepted practice under the Federal Rules of Civil Procedure and the potential for serious disruption of the efficient and expeditious conduct of discovery by the district courts. Such consequences should not be allowed to occur without full consideration by this Court, which bears the ultimate responsibility for the administration of justice under the Federal Rules of Civil Procedure. Moreover, this petition and the petition pending in No. 78-761 afford the Court the opportunity to consider the ramifications of the Government's attempt to subvert the purpose and structure of the Federal Rules of Civil Procedure on the fullest possible record and at the most opportune moment in the development of the Government's strategy. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 3, 1979

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illniois 60604

ARGUED: NOVEMBER 20, 1978
DECEMBER 14, 1978.

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ORIGINAL PETITION FOR
A WRIT OF MANDAMUS

No. 78-2316

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ILLINOIS BELL TELEPHONE COMPANY, AND SOUTHWESTERN BELL TELEPHONE COMPANY, *Petitioners*

VS.

HONORABLE JOHN F. GRADY, Judge for the United States District Court for the Northern District of Illinois,

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 74-C-633, Judge Grady

No. 78-2317

MCI Communications Corporation, et al.,
Plaintiffs-Appellees,

vs.

American Telephone and Telegraph Company,
Illinois Bell Telephone Company, and
Southwestern Bell Telephone Company,

Defendants-Appellants.

Order

In the instant appeal and conditional petition for writ of mandamus appellant-petitioner challenges the propriety of an order of the district court granting the motion of the United States of America to modify the then-existing protective order which governed the use of discovered materials in *MCI Communications Corp. v. ATT*. We hereby affirm the trial court's order.

I. THE PROCEDURAL HISTORY

MCI Communications Corporation, a communications common carrier engaged in providing private line communications services, filed suit against the American Telephone & Telegraph Company and its affiliates on March 6, 1974 in the United States District Court for the Northern District of Illinois alleging violations of Sections 1 and 2 of the Sherman Act. On August 6, 1974 the district court entered a protective order to govern the subsequent use of "all documents and other discovery materials produced in response to any documents request made upon plaintiffs or defendants in the . . . [case] . . . and to any deposition or portion of a deposition as to which confidential status is requested by either party." The protective order was entered at the request and signed consent of the parties. From 1974 to the present, discovery on the parties has proceeded pursuant to the terms of the protective order. Discovery

from nonparties has proceeded pursuant to other protective orders entered by the district court which expressly provided that the discovery materials obtained there under may be used solely in the preparation of for trial in *MCI v. ATT*.

On November 20, 1974 the United States filed its Section 2 Sherman Act suit against ATT in the District of Columbia. Three stays of this suit, one on motion of the United States of America, one on motion of ATT, and one on the Court's own motion interferred with the pace of discovery until November 28, 1978.

On November 17, 1977 nonparty United States of America moved in the District Court for the Northern District of Illinois for modification of the protective order entered on August 6, 1974 in order to allow the government access to all of the materials discovered in the MCI case. The government alleged that its action encompassed "virtually all of the anticompetitive practices of which plaintiffs complain here," and that the government would be able to gain access to those documents via discovery in the District of Columbia case but that immediate access would save time and money.

On September 11, 1978 Judge Greene granted the government's motion to permit access to discovery in *USA v. ATT* thus requiring MCI to provide to the government all documents "produced by defendants and requested by plaintiffs" in *Litton Systems, Inc. v. ATT*, No. 76 Civ. 2512 (S.D.N.Y.) and *MCI Communications Corp. v. ATT*, 74 C 633 (N.D.Ill.). ATT filed a writ of mandamus in the Second Circuit Court of Appeals naming Judge Greene as respondent in an attempt to gain review of this order.

On October 31, 1978 the Second Circuit Court of Appeals denied the writ of mandamus but granted a stay for 48 hours pending application for certiorari and for emergency stay to the Supreme Court. ATT filed its emergency petition to the Supreme Court and a temporary stay was

granted by Chief Justice Burger pending the filing of a response by the government. The Supreme Court later declined to continue the stay pending the disposition of the filed writ of certiorari. 47 U.S.L.W. 3332 (Nov. 13, 1978). ATT has complied with Judge Greene's order and has transferred the microfilm copies of the applicable documents to the government.

On October 9, 1978 Judge Grady granted the government's motion to modify the protective order in *MCI v. ATT* but stayed its order until October 23, 1978 in order to permit ATT to appeal the order. On October 16, 1978 ATT filed a motion for stay of Judge Grady's order pending disposition of its appeal, a motion for expedited consideration, its brief on appeal, and a conditional writ of mandamus directed to the consideration of the Court in the event that it would hold that Judge Grady's order is not properly appealable as a collateral order.

This Court continued the stay of the district court pending disposition of the case on appeal, and heard oral argument on November 20, 1978.

II. THRESHOLD INQUIRY: FINALITY OF THE DISTRICT COURT ORDER

In *Cohen v. Beneficial Industries Loan Corporation*, 337 U.S. 541 (1949), the Supreme Court delineated one of the several exceptions to the general rule that a final judgment is a prerequisite to appeal. The Supreme Court held the given order appealable

> because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

337 U.S. at 546-47.

The *Cohen* rule was explicitly not made applicable to orders respecting discovery in *Alexander v. United States,*

201 U.S. 117, 121 (1906) on the ground that a witness must first refuse to produce or to testify, and must be punished for criminal contempt, before a right to review arises.

The discovery order presently under review modifies an existing protective order in order to permit a nonparty access to discovered materials. Because the discovery order directs MCI to turn over the discovered materials to the government, ATT does not have the option sanctioned in *Alexander* in order to challenge and stop the transfer of custody of the materials. For these reasons, this court finds *Alexander* to be inapposite,[1] applies the "collateral order" doctrine of *Cohen*, and holds that the particular species of discovery order under review is final and appealable. *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390, 393 (7th Cir. 1978) (adopted en banc). For the same reasons, the conditional petition for writ of mandamus filed by ATT is denied.

III. THE MODIFICATION OF THE PROTECTIVE ORDER

The order of October 9, 1978 modifying the protective order on the motion of, and for the primary benefit for, a nonparty is based on two determinations. First, the district court concluded that allowing the government's motion would not interfere with the control that either it or the District of Columbia court had over their respective cases. Second, the district court expressly declined to rule that ATT would be prejudiced unduly by the modification of the protective order.

Appellant submits, inter alia, that the retroactive modification of a protective order in order to disclose discovered

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[1] *See Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied.* 380 U.S. 964 (1965). *Cf. Carter Products, Inc. v. Eversharp, Inc.*, 360 F.2d 868, 871-72 (7th Cir. 1966).

documents to a nonparty is a violation of the spirit and the logic of the Federal Rules of Civil Procedure. Specifically, appellant urges that modification of the protective order after appellant relied on its authority and scope for more than four years unduly prejudices appellant.

As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings. F.R.Civ.P. 26 (c). In the first instance, it is a matter for the district court to issue protective orders permitting a party to keep secret discovered material when "good cause" is shown. It is also within the discretion of the district court to modify existing protective orders to permit disclosure of discovered materials.

The question of whether it is permissible to modify a protective order on the motion of a nonparty in order to permit that nonparty retroactive access to discovered documents is apparently a case of appellate first impression.

On the one hand, several district courts have refused to enter protective orders which prevent disclosure to others litigating similar issues on the grounds that the Federal Rules of Civil Procedure do not foreclose collaboration in discovery, and further, that there was no showing that the moving party was exploiting one case solely to assist in the litigation of another. *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973); *Williams v. Johnson & Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970).

On the other hand, several other courts have declined to modify protective orders in order to permit a party to turn over discovered documents to a nonparty. In *GAF Corporation* v. *Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y. 1976), the court denied plaintiff's motion for an order allowing it to give to the government 52 documents selected from the hundreds of thousands requested and received in discovery. Plaintiff had concluded

that the documents evidenced an antitrust violation. The court reasoned that there had been an explicit understanding between the parties that discovery was being demanded solely for the preparation of the case [2] and in the face of that understanding and the potential augmentation of the government's awesome powers as investigator,[3] an attempt to persuade the government to initiate a suit in this manner would not be countenanced.

After a thorough review of the applicable case law, this Court notes that where a protective order is agreed to by the parties before its presentation to the court, there is a higher burden on the movant to justify the modification of the order. While it is not the case that the "sophisticated litigant" cannot take the scope delineated by a protective order "literally" even when "it is in terms subjected to change by further order of the court," nonetheless this Court cannot conclude that the district court erred in permitting modification of the protective order. The exceptional considerations warranting the alteration of an agreed protective order exist in the present case. The government filed its antitrust complaint eight months after the *MCI* complaint. Since the government filed its complaint against ATT nearly four years ago, there is no showing that the government seeks to exploit *MCI v. ATT* solely to obtain assistance in the litigation of *USA v. ATT*. In addition, there is no showing that any claim of privilege was waived or that anything discovered by MCI would be protected from a long and costly process in the District of Columbia case. ATT has already transferred the microfilms of docu-

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[2] *See also United States v. ARA Services, Inc.*, 1978-2 Trade Cases ¶ 62,250 (E.D.Mo. 1978).

[3] *Id.* at 132. *See also Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 1978-1 Trade Cases ¶ 61,961 (E.D.Pa. 1976).

ments to the government, pursuant to Judge Greene's order, and thus, the relaxation of the protective order in this case has only the effect of permitting MCI counsel to make the depositions and their analyses of data available to government counsel. We are impressed with the wastefulness of requiring government counsel to duplicate the analyses and discovery already made.

For these reasons, the district court order is AFFIRMED. However, the stay ordered by this Court pending the disposition of the appeal shall remain in effect until the mandate issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 633

MCI COMMUNICATIONS CORPORATION, ET AL.,
Plaintiffs,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Defendants

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Counterclaimants

v.

MCI COMMUNICATIONS CORPORATION, ET AL.,
Counterdefendants

Protective Order

WHEREAS, this case involves numerous and complex issues as to which parties have served broad and comprehensive requests for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure;

WHEREAS, each of the parties maintains voluminous records, including millions of printed or typewritten documents as well as computerized information subject to production pursuant to the document requests served by the parties;

WHEREAS, many of the documents and other discovery materials of each of the parties are likely to be confidential in nature within the meaning of Rule 26 of the Federal Rules of Civil Procedure, many documents and other discovery materials of each of the parties are likely to be privileged under Rule 26 of the Federal Rules of Civil

Procedure, and many documents and other discovery materials are likely to be protected from production as work product within the meaning of Rule 26 of the Federal Rules of Civil Procedure;

WHEREAS, the public interest in the prompt and orderly administration of justice requires that production of the voluminous documents and other discovery materials involved in the discovery requested in this case proceed as expeditiously as possible;

WHEREAS, none of the parties is willing to waive any of its rights with respect to any of its documents which are confidential or privileged or which reflect work product under Rule 26 of the Federal Rules of Civil Procedure;

WHEREAS, the need for prompt and orderly discovery is not inconsistent with the ability of the parties to make some examination to determine whether documents and other discovery materials are confidential or privileged or reflect work product but may make it impossible for them to conduct such examination on a sufficiently thorough basis to insure that their rights under Rule 26 of the Federal Rules of Civil Procedure are fully protected with respect to such documents and other discovery materials and;

WHEREAS, the Court wishes to establish procedures which are fair to all the parties, which will expedite the discovery process, and which will facilitate the handling by this Court of any problems that may arise in connection with discovery;

IT IS THEREFORE ORDERED that:

1. This order shall govern all documents and other discovery materials produced in response to any document request made upon plaintiffs or defendants in the above-captioned matter and to any deposition or portion of a deposition as to which confidential status is requested by either party.

2. All documents and other discovery materials as to which a claim of privilege or work product is asserted by any party shall be segregated by that party and shall be retained until further order of Court.

3. The production of any document or other discovery material by plaintiffs or defendants under this Order shall be without prejudice to any claim that such material is privileged under Rule 26 of the Federal Rules of Civil Procedure or protected from discovery as work product within the meaning of Rule 26 of the Federal Rules of Civil Procedure, and no party shall be held to have waived any rights under Rule 26 by such production. Any document or other discovery material turned over to an opposing party with respect to which a claim of privilege or work product is subsequently made shall be returned to the party producing the same, provided that the party disputing the claim of privilege may point the issue to the Court for determination. That determination will be made without regard to the fact that such document has been turned over to the other party pursuant to this Order. If the Court upholds the claim of privilege or work product, all copies of the document or other discovery material will be returned to the party producing it, or expunged, and, in either event, such document or other discovery material cannot be introduced into evidence in this or any other proceeding by any person without the consent of the party producing it; nor will such document be subject to production in any proceeding by virtue of the fact that it had been inadvertently disclosed in this proceeding.

4. All documents and other discovery material produced by plaintiffs and defendants shall initially be treated as confidential material, and if such status is requested by either party, all depositions or portions of depositions shall initially be treated as confidential.

5. With respect to any documents or other discovery material or any deposition which has been designated as

confidential, any other party may file a motion with the Court that such material should not be deemed confidential. Unless and until otherwise ordered by this Court, however, all documents and other discovery material and any deposition designated as confidential hereunder may be inspected only by the persons herein described.

6. Confidential material and any copies thereof, and notes made therefrom shall be disclosed only to attorneys in the offices of Jenner & Block and Sidley & Austin or to persons regularly employed in such attorneys' offices or to persons provided for in paragraph 7 hereof for use solely in the preparation or trial of this action. No copies shall be made except by or on behalf of attorneys from said offices. Any such attorneys making or causing to be made copies of confidential material shall maintain those copies within the possession of themselves or those entitled to access to such documents under paragraph 7 of this order.

7. Confidential material may be disclosed to other persons (other than attorneys in the offices of Jenner & Block and Sidley & Austin and persons regularly employed in their offices) whose assistance is required by said attorneys in the preparation or trial of this action, upon compliance with the following requirements of this paragraph. Each party will provide the other with a list of the persons who are to be regularly employed in this capacity before any documents are produced. Subject to this provision, this list may be supplemented from time to time as necessary so long as the names of such persons are submitted to the other party in sufficient time prior to their gaining access to confidential documents to permit objection to any person whose name is submitted. Each party reserves the right to object to any person being included on the list of those entitled to regular access to confidential documents. As to persons designated as entitled to regular access to confidential documents, as well as any other person to whom confidential material may be disclosed from time to time,

each such person shall first be advised by the attorney making the disclosure that pursuant to this protective order such person may not divulge such confidential material to any other persons except in the preparation or trial of this action and that disclosure in the preparation of the case is limited to persons entitled to knowledge of such documents under this Order. The attorney shall secure from each such person an affidavit describing the affiant and stating that he has read this protective order and understands that, pursuant to this protective order, he may not, and that he undertakes not to, divulge any confidential material except in accordance with this Order. Where such affidavit is executed by a person not regularly employed by a named party to this action, that affidavit, together with a list of the confidential material disclosed to such person, and the date of disclosure, shall be retained by the attorney making the disclosure. Where such affidavit is executed by a person regularly employed by a named party, but not designated in the list of the persons regularly employed in assisting in the litigation, that affidavit shall be served on counsel for the party producing the confidential document within 5 days after its execution, and the attorney making the disclosure shall retain a list of the confidential material disclosed, and the date of disclosure.

8. Confidential material may be disclosed to deponents during the course of their depositions if the attorney making such disclosure first advises the deponent that pursuant to this protective order such person may not divulge such confidential material to any other person.

9. In the event that any confidential material is included with, or the contents thereof are in any way disclosed in any pleading, motion, deposition transcript or other paper filed with the Clerk of this Court, such confidential material shall be kept under seal by the Clerk until further order of this Court; provided, however, that such paper shall be furnished to the Court and attorneys for the named parties,

and a duplicate copy thereof, with the confidential material deleted therefrom, may be placed in the public record.

10. Nothing in the foregoing provisions of this protective order shall be deemed to preclude any party from seeking and obtaining, on an appropriate showing, additional protection with respect to the confidentiality of documents or other discovery material.

IT IS SO ORDERED:

/s/ WILLIAM J. LYNCH

Judge, United States District Court

August 6th, 1974

Agreed to as to form and substance:

/s/ GEORGE L. SAUNDERS, JR.
George L. Saunders, Jr.

Attorney for all defendants

/s/ ROBERT L. BOMBAUGH
Robert L. Bombaugh

Attorney for all plaintiffs

APPENDIX C

Federal Rules of Civil Procedure

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for

payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was

complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.